Supreme Court, U.S.
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No. 88-1991

In the Supreme Court of the United States

October Term, 1988

WILLIAM DYKENS,

Petitioner,

v.

EASTERN AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court use this unpublished decision to overrule a federal preemption decision which has been followed and never criticized for five years and which does not conflict with decisions of this Court or other Circuits, so that this Petitioner may supplement the money damages he has been awarded with attorneys' fees and treble damages which are available to him only under state statutes which Congress has expressly preempted?

LIST OF PARTIES and RULE 28.1 LISTING

All parties and their positions are identified in the caption of this Brief in Opposition. The parent companies, subsidiaries and affiliates of Respondent Eastern Airlines, Inc., are:

Texas Air Corporation
Continental-Eastern Sales, Inc.
Continental Airlines, Inc.
System One Holding, Inc.
Jet Capital Corporation

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EASTERN AIRLINES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Respondent submits that this Court lacks jurisdiction to consider the Petition inasmuch as Respondent EASTERN AIRLINES, INC. filed a petition for bankruptcy pursuant to Chapter 11 of Title 11 of the United States Code on March 9, 1989. The automatic and mandatory stay provisions of the Bankruptcy Code apply to this Petition inasmuch as it pertains to "continuation . . . [of an] action . . . against the debtor that was . . . commenced before the commencement of the [bankruptcy] case." 11 U.S.C.S. 362(a)(1) (1985).

In *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir. 1983) *cert. denied* 478 U.S. 1021, 106 S.Ct. 3335 (1986) the Sixth Circuit held that the

automatic bankruptcy stay attaches to appeals taken from tort actions against the debtor. *See also*, *Commerzanstalt v. Telewide Systems, Inc.*, 790 F.2d 206, 207 (2d Cir. 1986) ("An appeal is indisputably a continuation of a judicial action . . . ."); *Teachers Insurance & Annuity Association of America v. Butler*, 803 F.2d 64, 65 (2d Cir. 1986).

STATUTES INVOLVED

To supplement the statutes set forth in the Petition, the substantive provisions of the Federal Aviation Act and the Rehabilitation Act prohibiting handicap discrimination in the airline industry are set forth below.

Federal Aviation Act, 49 U.S.C.S. Appx § 1374(c) (Supp. May 1989):

> No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.

Rehabilitation Act, 29 U.S.C.S. § 794 (Supp. May 1989):

> No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

STATEMENT OF THE CASE

On March 25, 1986 Petitioner William Dykens (hereinafter "Petitioner" or "Dykens") filed a complaint alleging that he, as a handicapped person, was wrongfully

denied air transportation as a result of a deviation by Respondent Eastern Airlines, Inc. (hereinafter "Eastern") from its tariff and policy of accepting handicapped passengers for transportation, consistent with the safety of other passengers. The complaint set forth claims for (1) violation of California Civil Code sections 54.1 and 54.3, state statutes concerning the rights of handicapped persons to public conveyances, public accommodations, and housing and (2) violation of federal statutes respecting discrimination against the handicapped in air travel, namely, provisions of the Federal Aviation Act (49 U.S.C. Appx § 1374(c)) and provisions of the Rehabilitation Act (29 U.S.C. Appx § 794).[1]

The matter proceeded to trial, on the same facts, under both the federal and state handicap discrimination statutes.[2] The district court made findings of fact that Petitioner Dykens was denied boarding in a last-minute decision made when Eastern's already-delayed plane was ready for departure, that Eastern acted reasonably after the denied boarding by flying Petitioner on the next available flight, that Petitioner sustained no physical injury, that Eastern did not act with malice, fraud,

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[1]Petitioner also set forth a tort claim for intentional infliction of emotional distress. After trial the district court ruled on the merits that Eastern was not liable for intentional or negligent infliction of emotional distress. (App. 7, 9.) Petitioner does not challenge judgment in favor of Eastern on the tort claim.

[2]The Rehabilitation Act authorizes recovery of attorneys' fees incurred in enforcing or charging a violation of the Act. 29 U.S.C.S. § 794a(b) (1982). The Federal Aviation Act does not authorize recovery of attorneys' fees. The state statutues authorize recovery of treble damages and attorneys' fees. Cal. Civil Code §§ 54.1, 54.3.

oppression or conscious or willful disregard, and that its conduct was not outrageous or extreme. (App. 6-7.)[3]

With respect to the federal statutes, the district court held that inasmuch as Eastern is not a recipient of federal financial assistance, the Rehabilitation Act does not apply to it, and that Petitioner had no private cause of action under the Federal Aviation Act. (App. 8.) Petitioner did not appeal these rulings.

The district court held that Petitioner's claim under the California state statutes was preempted pursuant to the preemption provision in the Federal Aviation Act at 49 U.S.C. Appx § 1305(a), which prohibits the states from "enact[ing] or enforc[ing] any law, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation." (App. 9.)

Petitioner recovered his common law remedy of damages and costs. He was awarded $15,000 for his inconvenience. He had retained his attorney pursuant to a 40% contingency fee contract. Although he was clearly not entitled to attorneys' fees or treble damages under the pertinent federal statutes, one of which authorized attorneys' fees when applicable, Petitioner sought attorneys' fees and treble damages under the state statutes and under the private attorney general doctrine, as codified in California Code of Civil Procedure § 1021.5.

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[3]All references to Appendix A of the Petition for Writ of Certiorari will be designated "App." followed by the page number(s).

The district court held that Petitioner was not entitled to attorneys' fees or treble damages under the state statutes, they having been preempted by the preemption clause in the federal statute, and that Petitioner was not entitled to attorneys' fees under the private attorney general doctrine upon a factual determination that the case did not result in vindication of an important public interest, inasmuch as it involved only a judgment mistake by individual employees, did not challenge airline policies or procedures, did not bring about any change in Eastern's policies toward handicapped persons and did not have any precedential value. (App. 8.)

Petitioner appealed the damages issue to the United States Court of Appeals for the Ninth Circuit. In a not-for-publication memorandum, the Ninth Circuit affirmed the district court's determination that attorneys' fees and treble damages were not available under the state statutes inasmuch as they were preempted, holding that the case was controlled by its 1984 decision in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984). The Ninth Circuit also affirmed the district court's determination that the case was inappropriate for application of the private attorney general doctrine. (App. 2-3.)

Petitioner now asks this Court to grant extraordinary relief, in the form of a writ of certiorari requiring that *Hingson* be overruled, to enable him to recover attorneys' fees and treble damages in addition to his common law recovery, even though federal antidiscrimination law contains a preemption provision which expressly precludes the state statutes on which he relies and even though Petitioner was not entitled to such remedies under the pertinent federal antidiscrimination statutes.

REASONS FOR DENYING THE WRIT

I.

HINGSON IS CORRECT AND DOES NOT CONFLICT WITH RULINGS OF THIS COURT OR OF OTHER CIRCUITS.

Petitioner's claim that the *Hingson* case conflicts with preemption principles announced by this Court rests upon his erroneous assertion that "[t]here is no claim that the Federal Aviation Act expressly pre-empts State laws providing attorneys fees and treble damages to individuals subjected to handicap discrimination . . . ." (Pet. at pp. 11-12.)[4] There *is* just such an express preemption provision in the Federal Aviation Act at 49 U.S.C.S. Appx § 1305(a)(1) (Supp. May 1989), which provides in relevant part:

> [N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation.

This Court's pronouncements regarding preemption explain that preemption occurs in two circumstances—when, in enacting a federal statute, Congress expresses an intent to preempt state law by promulgating a preemption provision, such as the one contained in the Federal Aviation Act, or when Congress's intent to preempt may otherwise be inferred, for instance, under such circumstances as actual irreconcilable conflict

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[4]All references to the Petition for Writ of Certiorari will be designated "Pet." followed by the page number(s).

between the federal and state law. *California v. ARC America Corp.*, No. 87-1862, 57 L.W. 4425; *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 106 S.Ct. 1890, 1898 (1986). This Court has further declared that in providing statutory attorney's fees provisions to encourage private enforcement in some circumstances, and in omitting similar provisions in other circumstances, Congress has made an implicit legislative determination as to which policies warrant such encouragement. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 264, 95 S.Ct. 1612 (1975). Remedies form an ingredient of any scheme of regulation, such that state law granting remedies not available under federal law is preempted. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773 (1959).

Because Congress expressly stated its intent to preempt state law relating to air carrier services, it is not necessary to look to the several cases cited by Petitioner respecting the standards for inferring an intent on the part of Congress to preempt.[5] There is no need to rely on inference or search for conflict when Congress states its intention to preempt.

Like Petitioner, the plaintiff in the *Hingson* case refused to acknowledge the effect of the preemption provision in the Federal Aviation Act. The Ninth Circuit rejected his attempt to apply inferential preemption standards when Congress had declared its intent to preempt and the scope of that preemption in the legislation. The court declared:

> Hingson argues that 49 U.S.C. § 1305(a)(1) does not preempt his claims because Civil Code Section 54.1 does not conflict with federal law.

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[5]Pet. at pp. 7, 9-10, 12, 15.

> This argument misses the point. Section 1305(a)(1) preemption is not limited to those state laws or regulations that *conflict* with federal law. It preempts state laws and regulations "*relating* to rates routes, or services." 49 U.S.C. § 1305(a)(1) (emphasis added [by *Hingson* Court]).
> *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (1984) (emphasis in original).

Contrary to Petitioner's claim, *Hingson* does not conflict with decisions of this Court concerning standards for inferring Congressional intent to preempt state legislation.

Nor does *Hingson* conflict with this Court's decision in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978 (1976). In *Nader* the Court, without addressing the preemption clause in the Federal Aviation Act at all, found only implicitly that a common law cause for misrepresentation may survive when it ruled that litigation of the common law claim did not have to be stayed pending administrative consideration by the Civil Aeronautics Board. *ID.* at 1983, 1988. The *Nader* ruling did not concern claims under state discrimination statutes. In accord with *Nader's* implicit holding that not all common law claims are preempted, the *Hingson* court held that Hingson's common law tort claim for infliction of emotional distress was not preempted. *Hingson*, *supra*, 743 F.2d at 1416.

The *Hingson* court gave careful attention to the preemption issue. The only analysis of the relationship between the preemption provision at section 1305(a)(1) and the savings clause at section 1506 of the Federal Aviation Act was made by the *Hingson* court. The court considered the legislative history of the two provisions

and found that the savings clause was simply incorporated intact from 1938 legislation, while the preemption section was specifically enacted as part of the Airline Deregulation Act of 1978 for the purpose of preventing state regulation. Legislative history also revealed that a narrow version of the preemption provision, under which only state enactment of laws determining routes, schedules or fares or other economic regulations would have been preempted, was rejected in favor of a broad preemption provision which preempted state enactment *and enforcement* of laws *relating* to rates, routes and *services* of air carriers. See *Hingson*, *supra*, 743 F.2d at 1416, fn. 11, and portions of House Report No. 95-1211, reprinted at 1978 U.S. Cong. & Admin. News at 3804-805.

In the five years since *Hingson* was decided, it has never been overruled or even criticized. It was accepted as correct in *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987); *Air Transport Association v. Public Utilities Commission of California*, 833 F.2d 200, 207 (9th Cir. 1987); and *Illinois Corporate Travel v. American Airlines*, 682 F.Supp. 378, 379 (N.D. Ill. 1988). It was followed in *Anderson v. USAir, Inc.*, *supra*, and *Illinois Corporate Travel v. American Airlines*, *supra*. There is no conflict among the Circuits.

In *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), cited by Petitioner, the court considered a claim that the value of the plaintiff's land had been reduced by noise and chemicals in aircraft exhaust from nearby O'Hare Airport. Bieneman's claim, unlike Petitioner Dyken's claim, did not relate to the services rendered by an air carrier, and presumably the section 1305(a)(1) preemption provision did not apply. As a consequence, the *Bieneman* court relied on the savings

clause at section 1506 of the Federal Aviation Act. Moreover, the case merely held that not all common law remedies are preempted, as the *Hingson* case acknowledged. *Bieneman v. City of Chicago*, 864 F.2d at 472-73.

Hingson was correctly decided, does not conflict with *Nader* or the inferred preemption cases decided by this Court, does not conflict with *Bieneman* or any other Circuit decision, and has never been so much as criticized by any other Circuit.

II.

HANDICAPPED INDIVIDUALS ARE NOT WITHOUT PROTECTION. FEDERAL LAWS AND REGULATIONS PROHIBIT DISCRIMINATION ON THE BASIS OF HANDICAP, AND COMMON LAW TORT REMEDIES ARE AVAILABLE.

Petitioner's claim that "airlines will be free to deny handicapped individuals their right to travel with impunity"[6] is unfounded. Were it not for federal laws and regulations prohibiting handicap discrimination, this preemption question would never have arisen. Both the Federal Aviation Act and the Rehabilitation Act, substantive provisions of which are set forth in the "Statutes Involved" section of this brief, prohibit discrimination on the basis of handicap. In addition, the Civil Aeronautics Board has adopted regulations which prohibit discrimination against the handicapped

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[6] Pet. at p. 8.

by air carriers. 14 C.F.R. §§ 382.2, 382.4, 382.5 (1988).[7] Violation of these laws and regulations can result in termination of federal financial assistance, assessment of civil penalties or issuance of a cease and desist order. 14 C.F.R. § 382.25 (1988).

Moreover, Petitioner and other handicapped individuals have common law remedies. In this case, petitioner prevailed on his common law claim[8] and was awarded $15,000 for the inconvenience of being required to take the next available flight the following morning. As Petitioner stresses, the courts have upheld the right of handicapped individuals to press certain common law claims against air carriers. (See cases cited at Pet. pp. 13-14.) The *Hingson* court also acknowledged preservation of the plaintiff's tort claim for intentional infliction of emotional distress. *Hingson*, *supra*, at 1416.

The fact that extraordinary remedies created by state legislation are preempted has not deprived Petitioner of his rights and remedy. Petitioner's claim is not that he has no remedy, but that he believes it should be greater. A ruling by this Court would not create rights in those who would otherwise be unprotected.

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[7]These regulations prohibit exclusion from or denial of the benefit of any air transportation or related service to a qualified handicapped person and provision of separate or different air transportation or related services when not reasonably necessary.

[8]Whether Petitioner's common law remedy arose under state or federal common law is a peripheral question which is not raised by this Petition.

III.

THIS CASE IS OF LIMITED IMPORTANCE INASMUCH AS IT IS NOT FOR PUBLICATION AND IT PERTAINS ONLY TO HANDICAP DISCRIMINATION CASES WHICH ARE BROUGHT UNDER RARE STATE DISCRIMINATION STATUTES WHICH AUTHORIZE EXTRAORDINARY CIVIL DAMAGES FOR HANDICAP DISCRIMINATION.

The ruling of this case was not published and has no precedential value. A ruling by this Court could affect only cases arising under the limited number of state statutes prohibiting handicap discrimination on airplanes and authorizing extraordinary civil remedies, not otherwise available as a common law remedy or under the private attorney general doctrine, for such discrimination.

Although many states have enacted statutes prohibiting discrimination on the basis of handicap in such areas as employment and housing, significantly fewer states have attempted to prohibit physical handicap discrimination on airplanes by way of state legislation. Still fewer have enacted statutes which provide civil remedies. Most states which have legislated on the subject provide that violation of the statute constitutes a misdemeanor and may result in imposition of a small

fine.[9]

A preliminary search of state statutes revealed only two other states which expressly authorize civil actions for damages to enforce state statutes prohibiting physical handicap discrimination on air carriers.[10]

This Petition, by which Petitioner seeks to recover extraordinary damages in addition to the compensatory damages which he was awarded, as well as lacking substantive merit, as discussed above, does not present an issue of sufficiently broad impact to warrant review by this Court.

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[9] *See e.g.*, Ala. Code §§ 21-7-3, 21-7-5 (1984); Ark. Stat. Ann. §§ 20-14-302 (1987); Fla. Stat. § 413.08 (1988); Idaho Code §§ 56-703, 56-706 (1988); Ill. Rev. Stat. §§ 23-3363, 23-3364 (1987); La. Rev. Stat. § 46:1952(B) (1986); Miss. Code Ann. §§ 43-6-5, 43-6-11 (1988); N.M. Stat. Ann. §§ 28-7-3, 28-7-5 (1988); N.C. Gen. Stat. §§ 168.3, 168-4.5 (1988); Okla. Stat. tit. 7, §§ 19.1, 19.2 (1987); Pa. Stat. Ann. tit. 43, §§ 953, 954, 961 (1989); S.C. Code §§ 43-33-20, 43-33-40 (1988).

[10] Hawaii Rev. Stat. Ann. §§ 347-13, 347-13.5 (1988) (limits damages to $1,000 and authorizes recovery of costs and reasonable attorneys' fees); Vt. Stat. Ann. tit. 9, §§ 4501, 4502(c) and 4506 (1988) (authorizes a civil action for injunctive relief, compensatory and punitive damages, costs and reasonable attorneys' fees).

CONCLUSION

Based on the foregoing, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on July 12, 1989, I served the within *Respondent's Brief in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 12, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)